

Larry A. Hammond, 004049  
Anne M. Chapman, 025965  
OSBORN MALEDON, P.A.  
2929 N. Central Avenue, 21st Floor  
Phoenix, Arizona 85012-2793  
(602) 640-9000  
lhammond@omlaw.com  
achapman@omlaw.com

John M. Sears, 005617  
P.O. Box 4080  
Prescott, Arizona 86302  
(928) 778-5208  
John.Sears@azbar.org

Attorneys for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

) No. P1300CR20081339

) Div. 6

) **REPLY IN SUPPORT OF**  
) **MOTION TO COMPEL**  
) **INTERVIEW**

Ruth Kennedy is a key fact witness who has, contrary to the State's assertion, been interviewed multiple times by the State on subjects ranging from her views on the death penalty to her willingness to surreptitiously pass Yavapai County Sheriff's Detective's questions to her granddaughters, who are also victims in this case. Ms. Kennedy has changed her story about what the tone of Carol Kennedy's last known words were and, in

SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA

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1 the course of her prolonged, one-sided communications with the State, has also had her  
2 mind changed about who may be responsible for the death of her daughter. The State's  
3 unilateral access to Ms. Kennedy under the Victim's Bill of Rights has already severely  
4 prejudiced Mr. DeMocker's rights to a fair trial, due process, confrontation and under the  
5 Eighth Amendment. In this context, Mr. DeMocker's Sixth Amendment, Due Process  
6 and Eighth Amendment rights require that Ms. Kennedy be compelled to submit to a  
7 defense interview. At a minimum, Ms. Kennedy should be compelled to submit to an  
8 interview regarding the alleged burglary.

9 Arizona courts have recognized that a victim's right to refuse an interview is not  
10 absolute, even after passage of the Victim's Bill of Rights. "[T]he due process clauses of  
11 the Fifth and Fourteenth Amendments give a defendant the right of access to any  
12 evidence favorable to the defense and material to either guilt or punishment." *State ex*  
13 *rel. Romley v. Superior Court In and For County of Maricopa*, 172 Ariz. 232, 236, 836  
14 P.2d 445, 449 (Ariz.App. Div. 1, 1992) (Lankford, J., concurring) (noting that any  
15 limitation of discovery is subject to the *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194,  
16 (1963)). "[N]othing in the Victims' Bill of Rights or section 13-4433 supports the  
17 argument that victims have a blanket right to be shielded from all contact with defendants  
18 or their attorneys until the time of trial." *See Champlin v. Sargeant, In and For County of*  
19 *Maricopa*, 192 Ariz. 371, 374-75, 965 P.2d 763, 766-67 (1998) (citing *State ex rel. Dean*  
20 *v. City Court*, 173 Ariz. 515, 516-17, 844 P.2d 1165, 1166-67 (App.1992) (holding that  
21 alleged victim may be compelled to testify at pretrial hearing)).

22 Where the rights of a victim under the Victim's Bill of Rights and the defendant's  
23 rights under the Constitution are in conflict, the defendant's constitutional rights prevail.  
24 "[A]ny restrictions on defendant's access to information essential to preparation for  
25 effective, reasonable cross-examination or impeachment of the victim in this case  
26 imposed pursuant to the Victim's Bill of Rights ***must be proportionate to the interest of***  
27

1 *protecting the victim as balanced against the defendant's due process right to a*  
2 *fundamentally fair trial. Id.*(added emphasis). Thus, a defendant's rights to due process  
3 trumps even a direct provision of the Victims Bill of Rights:  
4

5 [W]hen the defendant's constitutional right to due process conflicts with the  
6 Victims' Bill of Rights in a direct manner . . then due process is the superior right.

7 *State ex rel. Romley*, 172 Ariz. at 236, 836 P.2d at 449. "[W]hen the information  
8 is both essential to the defense and requires pretrial disclosure to have value to the  
9 defense, then due process requires that defendant be allowed to obtain it." *State ex rel.*  
10 *Id.* at 241, 836 P.2d at 453.

11 Contrary to the State's suggestion in its reply, passage of the VBR does not  
12 change the reasoning or rationale of the Supreme Court that due process includes the  
13 right to present a defense, which necessarily includes access to witnesses to prepare a  
14 defense. *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973).  
15 Nor does passage of the VBR change the ABA Guidelines which direct counsel to  
16 interview witnesses to the crime. *See American Bar Association, Guidelines for the*  
17 *Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003)  
18 (Commentaries to Guidelines 10.7 & 10.11).

19 The Confrontation Clause also requires a pretrial interview in this case because  
20 Ms. Kennedy's version of events has been inconsistent over time. Mr. DeMocker also  
21 needs to know what Ms. Kennedy's position is with respect to the death penalty in this  
22 case. The interview where Ms. Kennedy discusses her views on the issue was poorly  
23 recorded and as a result Mr. DeMocker does not know whether Ms. Kennedy is in favor  
24 of or opposes the death penalty in this case.<sup>1</sup>

25  
26  
27 <sup>1</sup> As noted in the motion, this interview was conducted in October 2009 and not disclosed to the defense until  
December 2009 despite repeated requests.

1 An elevated level of due process applies both to the guilt and penalty phases of a  
2 capital case. *Beck v. Alabama*, 447 U.S. 625, 638 (1980).

3 At a minimum, Ms. Kennedy should be compelled to submit to a defense interview  
4 regarding the alleged burglary. The *Champlin* case held that the key for determining if a  
5 victim/witness is covered by the VBR's right to refuse an interview is whether the  
6 offense for which the victim was a witness was "on the same occasion" as the offense for  
7 which the victim is a victim and a witness. "On the same occasion" is not defined within  
8 Section 13-4433. The *Champlin* court explained that the

9  
10 victim of crime # 1 who is a witness but not a victim of crime # 2,  
11 committed by the same defendant on another occasion, may be compelled  
12 to grant an interview regarding crime #2. Stated differently, those who are  
13 not victims but merely witnesses of particular criminal behavior, though  
perhaps victims of other behavior by the same defendant on separate  
occasions may be interviewed as to the former but not the latter.

14 192 Ariz. at 75. The Court went on to conclude that "[w]here the interview consists  
15 only of behavior witnessed, the potential for trauma is attenuated, the interviewee is not  
16 considered "the victim" as to that offense, and the need for protection is much  
17 diminished." *Id.* In *Champlin* the court did not discuss what constituted the "same  
18 occasion."

19 Here, the State has alleged that Mr. DeMocker committed both first degree burglary  
20 and capital murder of Ms. Kennedy. They have also alleged f(2) as an aggravating  
21 circumstance, that is, that Mr. DeMocker will be convicted of committing first degree  
22 burglary, a serious offense. Thus, the State has alleged two offenses against Mr.  
23 DeMocker that obviously did not occur concurrently in time. The State has solicited  
24 testimony that there was a struggle between Carol Kennedy and her attacker and that Ms.  
25 Kennedy was alive for some period of time before she died. Therefore, the burglary  
26 offense arguably did not occur on "the same occasion" as the murder. Ms. Kennedy is a  
27 victim of the murder because Carol Kennedy died as a result, but she is a witness to the

1 burglary and Mr. DeMocker should therefore be permitted to interview her as to the  
2 burglarly. The Victim's Bill of Rights is not triggered when a defendant seeks to obtain  
3 witness testimony relating to facts unrelated to his or her victimization. *Champlin*, 192  
4 Ariz. at 374-75.

5 **CONCLUSION**

6 Defendant Steven DeMocker, by and through counsel, hereby requests that this  
7 Court compel Ruth Kennedy to be interviewed by the defense.  
8

9 DATED this 30<sup>th</sup> day of March, 2010.

10  
11 By: \_\_\_\_\_

12 John M. Sears  
13 P.O. Box 4080  
Prescott, Arizona 86302

14 OSBORN MALEDON, P.A.  
15 Larry A. Hammond  
16 Anne M. Chapman  
17 2929 N. Central Avenue, Suite 2100  
Phoenix, Arizona 85012-2793

18 Attorneys for Defendant

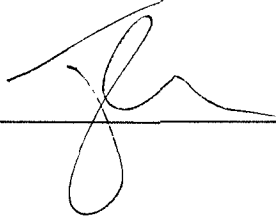
19  
20 **ORIGINAL** of the foregoing hand delivered for  
filing this 30<sup>th</sup> day of March, 2010, with:

21 Jeanne Hicks  
22 Clerk of the Court  
23 Yavapai County Superior Court  
120 S. Cortez  
24 Prescott, AZ 86303

25  
26 **COPIES** of the foregoing hand delivered  
27 this 30<sup>th</sup> day of March, 2010, to:  
28

1 The Hon. Thomas B. Lindberg  
2 Judge of the Superior Court  
3 Division Six  
4 120 S. Cortez  
5 Prescott, AZ 86303

6 Joseph C. Butner, Esq.  
7 Yavapai County Attorney  
8 Prescott Courthouse basket

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